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The Foreign Corrupt Practices Act: Prosecute Corruption and End Transnational Illegal Logging

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THE FOREIGN CORRUPT PRACTICES ACT: PROSECUTE CORRUPTION AND END TRANSNATIONAL ILLEGAL LOGGING

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Abstract: Transnational illegal logging, especially logging of protected species within protected areas, causes many irreparable harms, including decreasing biodiversity, increasing carbon emissions, deforestation, and economic and social harms to the communities where the illegal logging occurs. The United States is one of the world's largest consumers of wood products and thus drives the illegal logging industry far beyond our borders. Illegal logging is facilitated by corruption and bribery within many contexts, including bribes from those engaged in illegal logging to police, officials, regulators, and customs and export officials who are entrusted with the task of preventing illegal logging. No existing methods have succeeded in combating the flow of illegally harvested timber into the United States timber market. This Note suggests that the recently amended Lacey Act, which is intended to be used in illegal logging prosecutions, is not suited for this purpose, as its terms have been interpreted and defined through years of litigation in the wildlife trafficking context. This Note argues that the Department of Justice should begin using the Foreign Corrupt Practices Act's ("FCPA") anti-bribery provisions as an alternative method to prosecute those engaged in illegal logging. The expansively drafted FCPA is the perfect tool, as it can be applied to a wide range of actors and conduct that facilitates illegal logging.

INTRODUCTION

A bigleaf mahogany tree can live for 200 years or more, growing more than 150 feet tall and six feet wide.[1] Mahogany trees produce dense, durable wood with reddish hues, highly valued as timber.[2] The timber from a single tree can be worth more than $100,000 once constructed into luxury furniture and other wood products.[3] Mahogany is a slow-growth species, meaning that it is very slow to regenerate after depletion from logging.[4] These

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[1] Ani Youatt & Thomas Cmar, *The Fight for Red Gold: Ending Illegal Mahogany Trade from Peru*, 23 NAT. RESOURCES & ENV'T 19, 19 (2009).

[2] *Id.*

[3] *Id.*

[4] *Id.*

trees play a critical role in the ecosystems where they grow.[5] As a canopy species, mahogany trees provide a habitat and offer a source of food for a variety of animals and insects.[6] Mahogany was once widespread, and could be found from Mexico through the Amazon; now it has been depleted throughout Central America, and can only be found in small areas in Brazil, Bolivia, and Peru.[7]

In a May 2012 report, the Environmental Investigation Agency ("EIA")[8] documented how widespread and pervasive corruption facilitates illegal logging in Peru, leading to a flow of illegal timber from the Peruvian Amazon to importers in the United States.[9] The illegal logging in Peru, described in EIA's 2012 report, took place when logging companies harvested trees from inside protected regions of the Amazon.[10] The logging companies then forged false documents to move the trees through customs.[11] Forest owners frequently submitted plans to legally harvest trees from non-protected areas, and then the illegally harvested trees were exported under these falsified plans.[12]

According to the EIA report, at least twenty-two United States companies have imported illegal wood from Peru.[13] A Peruvian mahogany tree, illegally imported, can sell for $11,000 in the United States.[14] As the growth of illegal logging operations has outpaced legal logging operations in Peru, legal loggers have found themselves unable to compete.[15] Both the rapid depletion of the world's mahogany stocks and the legal hurdles that make confronting illegal logging difficult are well-recognized, longstanding challenges.[16]

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *About EIA*, ENVTL. INVESTIGATION AGENCY, http://eia-global.org/about-eia/ [http://perma.cc/CB3T-8ZYY]. The EIA is an environmental non-governmental agency that "seeks to transform international trade and supply chains to protect Earth's natural heritage." *Id.*

[9] JULIA M. URRUNAGA ET AL., ENVTL. INVESTIGATION AGENCY, THE LAUNDERING MACHINE: HOW FRAUD AND CORRUPTION IN PERU'S CONCESSION SYSTEM ARE DESTROYING THE FUTURE OF ITS FORESTS 4 (2012), http://eia-international.org/wp-content/uploads/The-Laundering-Machine.pdf [http://perma.cc/4NC6-LELX].

[10] *Id.* at 6–8; *Illegal Wood from the Peruvian Amazon Is Entering the USA*, ENVTL. INVESTIGATION AGENCY (Apr. 10, 2012), http://www.eia-international.org/illegal-wood-from-peruvian-amazon-is-entering-the-usa [http://perma.cc/JJU5-MYQW].

[11] URRUNAGA ET AL., *supra* note 9, at 4; *Illegal Wood from the Peruvian Amazon Is Entering the USA*, *supra* note 10.

[12] *Illegal Wood from the Peruvian Amazon Is Entering the USA*, *supra* note 10.

[13] URRUNAGA ET AL., *supra* note 9, at 31.

[14] *Id.* at 3–4.

[15] *Id.*

[16] *See generally* Tyler Roozen, *A Case of Need: The Struggle to Protect Bigleaf Mahogany*, 38 NAT. RESOURCES J. 603 (1998) (discussing the depletion of the world's mahogany stocks in 1998 and the legal hurdles to combating illegal logging).

By 2004, Peru had become the world's leading exporter of mahogany; between 2004 and 2007, it was exporting more than eighty percent of its harvest to the United States.[17] Peru's mahogany stocks were decimated; illegal loggers increasingly entered protected areas, searching for the last of the mahogany trees.[18] This search for mahogany trees harmed wildlife populations and threatened the survival of the last few hundred indigenous peoples living near the remaining mahogany trees.[19] In 2006, the World Bank estimated that illegal logging in Peru generated between $44.5 and $72 million annually for illegal loggers, compared to the $31.7 million generated by legal timber sales that contribute to Peru's economy.[20]

The United States timber industry is an active participant in the worldwide illegal logging industry.[21] The United States is the world's largest consumer of wood products and as such is a driving force of illegal logging beyond our borders.[22] Illegal logging can include: logging timber species protected by domestic law; logging outside of concession boundaries; logging on public lands and protected areas such as national parks or forest reserves; logging in prohibited areas such as steep slopes and river banks; taking more timber than authorized; logging without authorization; logging in breach of contractual obligations; and obtaining logging concessions illegally.[23]

Illegal logging has both economic and social costs to the countries where it takes place.[24] It also threatens biodiversity, increases carbon emissions, and causes landslides and other natural disasters.[25] Deforestation, caused in part by illegal logging, accounts for almost twenty percent of all greenhouse gas emissions into the Earth's atmosphere, and is thus a leading

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[17] Youatt & Cmar, *supra* note 1, at 19.

[18] *Id.*

[19] *Id.* Illegal logging causes conflict between the illegal loggers and the indigenous people who reside in the Peruvian Amazon. MARIANA ARAUJO, COUNCIL ON HEMISPHERIC AFFAIRS, THE ASHÁNINKA: ILLEGAL LOGGING THREATENING INDIGENOUS RIGHTS AND SUSTAINABLE DEVELOPMENT IN THE PERUVIAN AMAZON 1–4 (2005), http://www.coha.org/wp-content/uploads/2015/09/The-Ashaninka-Illegal-logging-in-the-Peruvian-Amazon.pdf [http://perma.cc/ES9L-YQ4L]. Illegal logging can harm indigenous peoples in many ways, including destroying the land the indigenous people need for survival and interfering with their longstanding cultural practices. *See id.*

[20] URRUNAGA ET AL., *supra* note 9, at 4.

[21] Youatt & Cmar, *supra* note 1, at 19.

[22] *Id.*

[23] DEBRA J. CALLISTER, CORRUPT AND ILLEGAL ACTIVITIES IN THE FOREST SECTOR: CURRENT UNDERSTANDINGS AND IMPLICATIONS FOR THE WORLD BANK 7 (1999), http://siteresources.worldbank.org/EXTFORESTS/Resources/985784-1217874560960/Callister.pdf [http://perma.cc/MJU8-YJPK].

[24] URRUNAGA ET AL., *supra* note 9, at 4.

[25] *Id.*

cause of global warming.[26] Illegal logging causes special harms to indigenous populations that are frequently in more immediate proximity to the illegal logging activity, and in some instances, violent conflicts between indigenous communities and illegal loggers have been reported.[27] It has also been used to fund wars.[28] For example, illegal logging was a primary source of funding for the civil war in Liberia, initiated by Charles Taylor, now a convicted war criminal.[29]

There is a strong connection between corruption, bribery, and environmental crimes, including illegal logging.[30] The potential bribe takers in the environmental context are almost boundless, and include police, officials, guards, regulators, customs and export officials, and even employees of state-owned companies.[31] There is a profound and well-documented link between corruption and illegal logging.[32] Examples of "grand"[33] corruption in the forest sector include companies bribing politicians, other senior government officials, or senior military officers to: obtain a timber concession or extend an existing concession; approve a timber processing venture; or avoid payment of fines or other fees.[34] Examples of "petty" corruption in the forest sector include bribing low-level government officials, members of

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[26] *See Illegal Logging in Indonesia: The Link Between Forest Crime and Corruption*, U.N. OFFICE ON DRUGS & CRIME (June 1, 2010), http://www.unodc.org/unodc/en/frontpage/2010/June/illegal-logging-in-indonesia-the-link-between-forest-crime-and-corruption.html [http://perma.cc/6MD8-YTAG]. One expert has noted that, "[I]llegal deforestation can hinder carbon capture and climate change mitigation efforts." Ibrahim Thiaw, *The Critical Link Between Resource Plunder and Illegal Trade in Wildlife*, U.N. AFR. RENEWAL, http://www.un.org/africarenewal/web-features/critical-link-between-resource-plunder-and-illegal-trade-wildlife [http://perma.cc/3RFT-MX2Y].

[27] *See, e.g.*, URRUNAGA ET AL., *supra* note 9, at 4; Marla Kerr, Note, *Ecotourism: Alleviating the Negative Effects of Deforestation on Indigenous Peoples in Latin America*, 14 COLO. J. INT'L ENVTL. L. & POL'Y 335, 348–53 (2003); Alyssa A. Vegter, Comment, *Forsaking the Forests for the Trees: Forestry Law in Papua New Guinea Inhibits Indigenous Customary Ownership*, 14 PAC. RIM L. & POL'Y J. 545, 554 (2005).

[28] *See, e.g.*, JOHN WOODS ET AL., FOREST TRENDS, INVESTMENT IN THE LIBERIAN FOREST SECTOR: A ROAD MAP TO LEGAL FOREST OPERATIONS IN LIBERIA 1 (2008), http://www.forest-trends.org/documents/files/doc_1320.pdf [http://perma.cc/854F-SYF8].

[29] *Id.* at 1–2; Rudy S. Salo, Note, *When the Logs Roll Over: The Need for an International Convention Criminalizing Involvement in the Global Illegal Timber Trade*, 16 GEO. INT'L ENVTL. L. REV. 127, 132–34 (2003).

[30] Marcus Asner et al., *The Foreign Corrupt Practices Act and Overseas Environmental Crimes: How Did We Get Here and What Happens Next?*, DAILY ENV'T. REP., July 12, 2012, at B-1 to B-2.

[31] *See id.* at B-3.

[32] *See id.* at B-2. *See generally* CALLISTER, *supra* note 23 (identifying corrupt activities in the forest sector and their impact).

[33] CALLISTER, *supra* note 23, at 9–10. Distinctions between "grand" and "petty" corruption are used by some scholars, and may be helpful to understand that corruption can take many forms from attempts to use bribery to change laws and policy, to bribing a forest official to ignore documentation irregularities. *Id.*

[34] *Id.*

local government, or military personnel to: falsify documents as to the amount or species of trees harvested; avoid reporting illegal harvesting; falsify export documents; or ignore illegal logging or other violations of forest management policy.[35]

Corruption flourishes in the forest sector and illegal logging industry for a number of reasons.[36] Forest regions tend to be sparsely populated and remote, allowing illegal activity to go undetected by the public or media.[37] Moreover, logs are essentially fungible commodities, making it difficult for a cursory inspection to distinguish between legally and illegally harvested timber.[38]

The United States uses a variety of tools to protect forests and prevent illegal logging, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES")[39] and the Lacey Act.[40] Despite these strategies and other efforts to combat illegal logging, it remains a serious problem.[41] In 2012, the World Bank released a report recommending an increased use of the criminal justice system to combat illegal logging.[42] The report characterized existent use of the criminal justice system for this purpose as "sporadic," "limited," and "ineffective."[43] One of the report's central recommendations is that the criminal justice system be used to "attack corruption" by prosecuting those who give and receive bribes to facilitate illegal logging.[44]

Part I of this Note examines the current state of transnational illegal logging, with particular focus on the weaknesses of statutes currently used

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[35] *Id.*

[36] Arnoldo Contreras-Hermosilla, *Law Compliance in the Forestry Sector: An Overview* 10–11 (World Bank Inst., Working Paper No. 37205, 2002), http://siteresources.worldbank.org/WBI/Resources/wbi37205.pdf [http://perma.cc/TXT6-GBFG].

[37] *Id.*

[38] Michael L. Brown, Note, *Limiting Corrupt Incentives in a Global REDD Regime*, 37 ECOLOGY L.Q. 237, 254 (2010).

[39] *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087 [hereinafter CITES]. CITES is implemented domestically by the Endangered Species Act. 16 U.S.C. § 1532(4) (2012) (defining "Convention" as used in the Endangered Species Act as "the Convention on International Trade in Endangered Species of Wild Fauna and Flora"); *id.* § 1538(c)(1) (providing that "[i]t is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof").

[40] *See* 16 U.S.C. §§ 3371–3378.

[41] *See* MARILYNE PEREIRA GONCALVES ET AL., WORLD BANK, JUSTICE FOR FORESTS: IMPROVING CRIMINAL JUSTICE EFFORTS TO COMBAT ILLEGAL LOGGING, at vii–viii (2012), http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Illegal_Logging.pdf [http://perma.cc/ZE3E-78WX].

[42] *Id.*

[43] *Id.*

[44] *Id.* at ix.

to prosecute illegal logging.[45] It introduces the Lacey Act and describes how the scope of the Act has expanded over the last century, most recently to include timber.[46] It examines the evolving negligence mens rea requirement of the Lacey Act and suggests that a stricter standard may be required to disrupt the illegal logging cycle that has engulfed the United States timber industry.[47] Finally, Part I analyzes other attempts to prosecute illegal logging and suggests that they demonstrate the difficulty of successful prosecutions using the current methods.[48] Part II of this Note introduces the Foreign Corrupt Practices Act ("FCPA") and analyzes its anti-bribery statutory provisions.[49] Part II then analyzes the recent escalation of FCPA prosecutions, a trend that some commentators have suggested is moving closer to a strict liability standard.[50] Finally, Part III of this Note proposes that the FCPA is the best method for disabling the illegal logging sector due to its expansive reach and the ease with which prosecutors could prove an FCPA violation in many illegal logging transactions.[51]

I. EXISTING TOOLS USED TO PROSECUTE ILLEGAL LOGGING AND THEIR WEAKNESSES

The Lacey Act is a federal statute that prohibits interstate and international trafficking in protected wildlife and timber.[52] The Act's mens rea requirement has evolved over time, most recently to a two-tier standard requiring "knowing" violations for a felony charge and violations of "due care" for a misdemeanor charge.[53] In its current form, the Act has resulted in only a small number of prosecutions for trafficking in illegally harvested timber.[54] Prosecutions under the Lacey Act require substantial factual findings, which may be difficult to prove in timber cases.[55] This is due to the length of timber supply chains as compared to supply chains in wildlife trafficking, and the difficulty inspectors have in definitively identifying illegal timber as compared to the ease of identifying illegally trafficked wildlife at

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[45] *See infra* notes 52–132 and accompanying text.
[46] *See infra* notes 59–102 and accompanying text.
[47] *See infra* notes 59–102 and accompanying text.
[48] *See infra* notes 103–132 and accompanying text.
[49] *See infra* notes 133–225 and accompanying text.
[50] *See infra* notes 133–225 and accompanying text.
[51] *See infra* notes 226–301 and accompanying text.
[52] *See* 16 U.S.C. §§ 3371–3378 (2012)*; infra* notes 59–132 and accompanying text.
[53] *See* Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 36 (1995) (describing the evolution of the Lacy Act's mens rea requirement); *infra* notes 59–132 and accompanying text.
[54] *See* 16 U.S.C. §§ 3371–3378; *infra* notes 59–132 and accompanying text.
[55] *See* 16 U.S.C. §§ 3371–3378; *infra* notes 59–132 and accompanying text.

inspection points.[56] It is also unclear how the Lacey Act's "due care" standard would be effectively applied to illegal timber trafficking.[57] Other attempts to stem the flow of illegal logging in the United States have also failed to stem the flow of illegally harvested timber into the country.[58]

A. The Lacey Act

1. The Expanding Scope of the Lacey Act and the Act's Negligence Mens Rea Requirement

The Lacey Act of 1900, introduced by Iowa Congressman John Lacey,[59] was originally passed with the intent to preserve endangered animals and wild birds by making it a federal crime to illegally hunt game in one state, and then profit from its sale in another state.[60] Though the Act extended to some other animals, it was primarily intended to preserve and restore bird populations and eradicate invasive species, the particular passion of Congressman Lacey.[61] Over its history, the Lacey Act's scope and attendant penalties have been significantly expanded.[62] At present, the Act prohibits interstate and international trafficking in protected wildlife and timber.[63]

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[56] *See infra* notes 59–132 and accompanying text.

[57] *See* 16 U.S.C. § 3373(d); *infra* notes 59–132 and accompanying text.

[58] *See infra* notes 59–132 and accompanying text.

[59] Anderson, *supra* note 53, at 36.

[60] Lacey Act, ch. 553, 31 Stat. 187, 188 (1900) (current version at 16 U.S.C. §§ 3371–3378); *Enlarging the Powers of the Department of Agriculture*, 33d Cong. 4871–74 (1900) (statement of Rep. John Lacey).

[61] *See Enlarging the Powers of the Department of Agriculture*, *supra* note 60.

[62] *See generally* Anderson, *supra* note 53 (providing history of the Lacey Act and how it has evolved over time, noting that it has become the "premier weapon" against wildlife trafficking).

[63] 16 U.S.C. § 3372. The act prohibits, in pertinent part:

> (a) Offenses other than marking offenses
> It is unlawful for any person—
> (1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;
> (2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce—
> (A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law;
> (B) any plant taken, possessed, transported, or sold in violation of any law or regulation of any State . . .
> (3) within the special maritime and territorial jurisdiction of the United States (as defined in section 7 of Title 18)—
> (A) to possess any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law or Indian tribal law, or

The Act was first amended in 1935 to expand its reach slightly to any "person, firm, corporation or association" who violated its provisions and to apply to interstate shipments by any method, rather than only shipments made by common carrier.[64] It was significantly amended in 1969 when it was revised to cover amphibians, reptiles, mollusks, and crustaceans.[65] A criminal mens rea was established— "knowingly and willfully" —and civil penalties were expanded to apply to negligent violations, to those who knowingly violated the act, or who, through the "exercise of due care," should have known they were violating the law.[66] In 1981, the Act was amended again to keep pace with a "massive illegal trade in fish and wildlife."[67] It was combined with the Black Bass Act, bringing fish under the purview of the Lacey Act.[68] The maximum civil fine was raised to $10,000.[69] The word "willfully" was removed from the language of the mens rea requirement, as Congress found that it had hampered enforcement.[70] At present, the Lacey Act creates two levels of criminality: anyone who violates the Act *knowing* their conduct is a violation of the law is guilty of a felony, and anyone who violates the Act and *should have known* their conduct was in violation of the law is guilty of a misdemeanor.[71]

In 2001, in *United States v. Santillan*, the United States Court of Appeals for the Ninth Circuit held that the Lacey Act did not require the defendant to have knowledge of the particular law violated, as long as the defendant was aware of the unlawfulness of their conduct.[72] In *Santillan*, the defendant was a tropical fish storeowner from Southern California.[73] Crossing back into the United States following a trip to Tijuana, the defendant claimed he had nothing to declare.[74] In fact, he had ten baby parrots stuffed under his car seats.[75] Defendant admitted to knowing that he was "not al-

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> (B) to possess any plant . . . taken, possessed, transported, or sold in violation of any law or regulation of any State . . . .

Id.

[64] Anderson, *supra* note 53, at 45–46.

[65] *See* S. REP. NO. 91-526, at 1 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1413, 1413–16.

[66] *Id.* at 12–14; *see* Anderson, *supra* note 53, at 36–53 (discussing the history of amendments to the Lacey Act and their impact).

[67] S. REP. NO. 97-123, at 1 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748, 1748.

[68] *See* H.R. REP. NO. 97-276, at 30–33 (1981).

[69] Lacey Act of 1981, Pub. L. No. 97-79, § 4(a)(1), 95 Stat. 1073 (codified as amended in 16 U.S.C. § 3373(a) (2012)).

[70] Anderson, *supra* note 53, at 49; *see* H.R. REP. NO. 97-276, at 31–33 (letter of Donald Paul Hodel, Undersecretary of the Interior); S. REP. NO. 97-123, at 2, 10–11.

[71] 16 U.S.C. § 3373(d)(1)–(3); United States v. Place, 693 F.3d 219, 222–23 (1st Cir. 2012).

[72] 243 F.3d 1125, 1129 (9th Cir. 2001).

[73] *Id.* at 1127.

[74] *Id.*

[75] *Id.*

lowed" to bring the birds into the United States, but assumed that it was a minor offense that would simply result in the birds being seized, if discovered.[76] The *Santillan* court affirmed the defendant's conviction for Lacey Act violations, finding that the Lacey Act's "knowingly" mens rea requirement was met when the importer was aware that the wildlife or animals imported were "tainted by illegality."[77] The court held that the Lacey Act did not require knowledge of the particular law violated, as long as the defendant was aware of the unlawfulness of his or her conduct.[78]

The *Santillan* court held that merely importing illegal fish or wildlife is insufficient, that a defendant cannot be convicted of a Lacey Act violation if "there was illegality, unknown to the importer, associated with its taking."[79] Thus, the Lacey Act does not impose strict liability for any violation, which the court explains is to protect "otherwise innocent conduct."[80] The correct application of the "knowingly" mens rea has proven to be a "vexatious problem" for courts.[81] In *United States v. Bronx Reptiles*, the United States Court of Appeals for the Second Circuit overturned the district court's Lacey Act conviction of a corporate defendant for importing frogs in inhumane or unhealthful conditions, finding that the defendant was unaware of the shipping environment.[82]

In 2008, the Lacey Act—long the most powerful tool for the prosecution of fish and wildlife crimes[83]—was amended (the "2008 Amendments") to cover a broad range of plants and plant products.[84] Prior to the 2008 Amendments, the Lacey Act only applied to plants that were indigenous to the United States and listed under the Endangered Species Act (ESA), on a state's protected species list, or listed in one of the three appendices to

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[76] *Id.*
[77] *Id.* at 1129.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] United States v. Bronx Reptiles, Inc. (*Bronx Reptiles II*), 217 F.3d 82, 83 (2d Cir. 2000). The court addressed the question, "When a criminal statute renders unlawful an act "knowingly" undertaken by the defendant, what must the extent of the defendant's knowledge be to permit conviction?" *Id.*
[82] *Id.* at 83–84; United States v. Bronx Reptiles, Inc. (*Bronx Reptiles I*), 949 F. Supp. 1004, 1013–14 (E.D.N.Y. 1996), *aff'd*, 26 F. Supp. 2d 481 (E.D.N.Y. 1998), *rev'd*, 217 F.3d 82 (2d Cir. 2000). The defendant was convicted under 18 U.S.C. § 42(c). *Bronx Reptiles II*, 217 F.3d at 83.
[83] Anderson, *supra* note 53, at 85 (describing the tremendous importance of the Lacey Act in the fight against illegal wildlife trafficking).
[84] Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 8204, 122 Stat. 1291, 1291–93 (codified as amended at 16 U.S.C. §§ 3371(f), 3373(a), (d) (2012)); Elinor Colbourn & Thomas W. Swengle, *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, ST036 A.L.I. CONTINUING LEGAL EDUC. 365, 368 (2012).

CITES.[85] The 2008 Amendments expanded the reach of the Lacey Act to timber, including timber that was illegally harvested in its country of origin before export to the United States.[86] It included raw timber and manufactured or value-added products like furniture and musical instruments.[87] The amended Lacey Act defines "plant" as any "wild member of the plant kingdom, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest stands."[88] Despite the expansion of the Lacey Act to include timber, to date there have been few prosecutions under the amended statute, leading one commentator to observe: "[T]he current dormant status of the new authority suggests that the Act is not serving as a realistic enforcement mechanism."[89]

2. Applying the Lacey Act's "Due Care" Standard to the Timber Industry

The 2008 Lacey Act Amendments expanding the Act to include illegally harvested timber brought under its purview a considerable range of corporate actors.[90] The expanded scope of the Act is significant, as the United States is "the largest wood products consumer and one of the top importers of tropical hardwoods," much of which comes from regions where illegal logging is known to be widespread.[91] The Lacey Act requires a "knowingly" mens rea standard for a felony offense under the statute.[92] The Act also punishes violators who fail to exercise "due care" in determining whether the products (i.e. illegally poached game or illegally harvested timber) in question are legal, with a misdemeanor charge.[93] The due care standard is intended to incentivize timber importers to question the origins of their products, thus increasing diligence throughout the supply chain.[94]

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[85] *See* U.S. DEP'T OF AGRIC., LACEY ACT: FREQUENTLY ASKED QUESTIONS (2013), http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf [http://perma.cc/3688-KGXR].

[86] 16 U.S.C. § 3371(f)(1) (defining plants to include trees); *id.* § 3372(a)(2)(B)(i) (prohibiting the taking of plants in violation of United States law or the law of foreign countries); Colbourn & Swengle, *supra* note 84, at 369.

[87] 16 U.S.C. § 3371(f); *see* Consensus Statement of Importers, Non-Governmental Organizations, and Domestic Producers on Lacey Act Clarifications (July 17, 2009), http://www.troutmansandersnews.com/marcom/news/TS-Intl_Trade_2009-07-17.pdf [http://perma.cc/BQ46-69LW].

[88] 16 U.S.C. § 3371(f).

[89] Sean H. Waite, Note, *Blood Forests: Post Lacey Act, Why Cohesive Global Governance Is Essential to Extinguish the Market for Illegally Harvested Timber*, 2 SEATTLE J. ENVTL. L. 317, 337 (2012).

[90] Rachel Saltzman, Commentary, *Establishing a "Due Care" Standard Under the Lacey Act Amendments of 2008*, 109 MICH. L. REV. FIRST IMPRESSIONS 1, 2 (2010), http://repository.law.umich.edu/mlr_fi/vol109/iss1/1 [perma.cc/63MJ-CCXD].

[91] *Id.*

[92] 16 U.S.C. § 3373(d)(1).

[93] *Id.* § 3373(d)(2)–(3).

[94] Saltzman, *supra* note 90, at 2–3.

The precise meaning of "due care" within the timber industry context is not yet clear.[95] According to the legislative history, the due care standard is intended to ensure that an importer must act with the care that "a reasonably prudent person would exercise under the same or similar circumstances."[96] Tracing the origins of illegally harvested timber back along the supply chain may prove to be a heavy financial and logistical burden to timber importers.[97] Given the expense of using existing technology and methodologies to accurately determine the origin of the timber, and the difficulty of determining the legal origin of the timber otherwise, it is unclear exactly what care a "reasonable" importer would take in verifying the origins of their timber.[98] Unlike the ten baby parrots stuffed under car seats at issue in *Santillan*,[99] timber is essentially a fungible commodity, and an importer could more easily claim to be unaware that the timber being imported is illegal in nature.[100] Some commentators have argued that there is insufficient guidance to understand how "due care" will be measured in the timber industry context; Lacey Act prosecutions can be intensely fact specific, limiting their precedential value, and judicial opinions analyzing the due care standard are scant.[101] The lack of clarity in the due care standard could allow importers flexibility to argue that they acted with due care, and thus avoid prosecution for importing illegally harvested wood.[102]

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[95] *See id.*

[96] *See* S. REP. NO. 97-123, at 10–11 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748, 1757–58.

[97] *See* Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L.J 419, 431 (2015). *See generally* Andrea Migone & Michael Howlett, *From Paper Trails to DNA Barcodes: Enhancing Traceability in Forest and Fishery Certification*, 52 NAT. RESOURCES J. 421 (2012) (describing the current financial and logistical challenges in tracing illegally harvested hardwood and proposing the introduction of DNA tracing technology).

[98] *See* Migone & Howlett, *supra* note 97, at 423, 436; Saltzman, *supra* note 90, at 3.

[99] *See* United States v. Santillan, 243 F.3d 1125, 1127 (9th Cir. 2001).

[100] *See* Brown, *supra* note 38, at 254 (explaining that because timber is essentially a fungible commodity, it is "difficult to distinguish [between] legally and illegally harvested wood").

[101] Saltzman, *supra* note 90, at 3. *But see* Francis G. Tanczos, Note, *A New Crime: Possession of Wood—Remedying the Due Care Double Standard of the Revised Lacey Act*, 42 RUTGERS L.J. 549, 567–68 (2011) (noting the lack of clarity in the due care standard as it applies to the timber industry, but arguing that such ambiguity could lead to overcriminalization of innocent importation activity).

[102] *See* Brown, *supra* note 38, at 254 (noting the challenge in distinguishing between legally and illegally harvested wood); Saltzman, *supra* note 90, at 3 (noting the ambiguity of the "due care" standard, as applied to timber importers); Tanczos, *supra* note 101, at 567 (noting that compliance with a "due care" standard should allow an importer to avoid any adverse consequences or criminal prosecution); Waite, *supra* note 89, at 337 (noting the "dormant status" of the Lacey Act in regards to illegal timber harvesting prosecutions).

B. Other Attempts at Prosecuting Illegal Logging

Despite the limited use of the Lacey Act to prosecute illegal logging,[103] those fighting illegal logging both domestically and internationally have attempted to use the United States court system to seek relief.[104] Although few such cases have been won on the merits,[105] there has been at least one success.[106] The failure of existing United States laws to prevent the importation of illegal mahogany into the United States has become a popular symbol of the evils of illegal logging, and the United States' role as a top consumer of timber.[107]

In *Native Federation of Madre De Dios River & Tributaries v. Bozovich Timber Products, Inc*., organizations representing an indigenous community in Peru brought a case in the United States Court of International Trade ("CIT") against United States companies that import timber from Peru and a number of United States government agencies.[108] This case was brought under the section of the ESA that implements CITES domestically.[109] Indigenous groups from Peru's Madre de Dios region led the call for Peru and international communities to combat the scourge of illegal mahogany logging.[110]

The Natural Resources Defense Council ("NRDC"), a United States-based environmental advocacy organization, spearheaded the effort to combat illegal mahogany logging in the United States, focusing on the demand-side of the supply chain.[111] Peru lists bigleaf mahogany in Appendix III of CITES, triggering a number of requirements including a certificate of origin for all mahogany exports.[112] Despite being listed under a CITES appendix, which is intended to stem the flow of illegal logging, illegal mahogany log-

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[103] *See* Waite, *supra* note 89, at 337 (noting the "dormant status" of the Lacey Act in regards to illegal timber harvesting prosecutions).

[104] *See infra* notes 108–132 and accompanying text.

[105] *See, e.g.*, Native Fed'n of Madre De Dios River & Tributaries v. Bozovich Timber Prods., Inc., 491 F. Supp. 2d 1174 (Ct. Int'l Trade 2007) (example of case in which plaintiffs failed to obtain relief for a claim against United States importers, who allegedly imported illegal Peruvian Mahogany, and United States government agencies, for allegedly allowing the importers' illegal conduct, due to lack of jurisdiction in the court where it was brought).

[106] *See* Castlewood Prods., L.L.C. v. Norton (*Castlewood Prods. II*), 365 F.3d 1076, 1082 (D.C. Cir. 2004) (example of successful anti-illegal logging action by the United States government, where an agency's decision to impound illegally harvested Brazilian mahogany was upheld).

[107] *See* Youatt & Cmar, *supra* note 1, at 23. This failure helped to stimulate the 2008 amendments to the Lacey Act, which expanded the Act to ban the importation of illegal timber and wood products. *Id.*

[108] 491 F. Supp. 2d at 1175–76.

[109] *Id.*

[110] Youatt & Cmar, *supra* note 1, at 19.

[111] *Id.* at 20.

[112] *Id.*

ging remained widespread.[113] The NRDC argued that CITES required importing countries, like the United States, to help ensure compliance, especially in the face of evidence showing Peru's export certificates of origin were not validly issued.[114]

Plaintiffs alleged that defendants had violated, and continued to violate, Section 9(c) of the ESA, which implements CITES.[115] CITES is an international treaty, signed by the United States and many other countries,[116] that places different levels of protection on species listed in one of its three appendices.[117] A listing on one of the appendices triggers different levels of protection, different prohibitions, and different documentation requirements.[118] Plaintiffs alleged that the defendant importers import bigleaf mahogany from Peru without valid export permits, and that the United States government permits defendant importers' illegal conduct.[119] The case allowed plaintiffs the opportunity to accuse United States importers of playing a role in the illegal logging of Peruvian bigleaf mahogany.[120] The case turned on a jurisdictional issue; the court granted the defendants' motion to dismiss, finding that it lacked subject matter jurisdiction to hear the case, and thus did not reach the merits.[121] Ultimately, this attempt to use the CIT to enforce the ESA failed to produce a legal result stemming the flow of illegal mahogany from Peru into the United States, although it did allow plaintiffs the chance to present compelling evidence indicating that much of the imported mahogany was illegal.[122]

Prior to plaintiffs' unsuccessful effort to prevent illegal mahogany trafficking in *Native Federation of Madre De Dios River & Tributaries*, there had been one case in which the United States Court of Appeals for the District of Columbia upheld the United States government's decision to impound illegally harvested Brazilian mahogany.[123] In 2002, Castlewood Products L.L.C., alongside a coalition of lumber companies, filed suit in the United States District Court for the District of Columbia seeking the release

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[113] *Id.*

[114] *Id.* at 21.

[115] Native Fed'n of Madre De Dios River & Tributaries v. Bozovich Timber Prods., Inc., 491 F. Supp. 2d 1174, 1175–76 (Ct. Int'l Trade 2007); *see* CITES, *supra* note 39.

[116] *Member Countries*, CITES, http://www.cites.org/eng/disc/parties/index.php [http://perma.cc/NH28-C5VJ] (providing information about member countries).

[117] CITES, *supra* note 39, at 1090–96; United States v. Place, 693 F.3d 219, 222 (1st Cir. 2012).

[118] CITES, *supra* note 39, at 1090–96; *Place*, 693 F.3d at 222.

[119] *Native Fed'n of Madre De Dios River & Tributaries*, 491 F. Supp. 2d at 1176.

[120] *See id.* at 1176–77.

[121] *Id.* at 1185–86.

[122] Youatt & Cmar, *supra* note 1, at 22.

[123] *See Native Fed'n of Madre De Dios River & Tributaries*, 491 F. Supp. 2d at 1185–86; *Castlewood Prods. II*, 365 F.3d 1076, 1083–86 (D.C. Cir. 2004).

of shipments of mahogany from Brazil that had been impounded by the Animal and Plant Health Inspection Service ("APHIS") of the United States Department of Agriculture.[124] APHIS impounded the shipment after Brazil's Management Authority provided information to the United States Department of the Interior's Fish and Wildlife Service, indicating that the timber was not legally obtained.[125] In *Castlewood Products L.L.C. v. Norton*, the plaintiffs argued that as the proper Brazilian authorities had signed the export documents, they were beyond the reach of United States law.[126]

Unlike *Native Federation of Madre De Dios River & Tributaries*, *Castlewood Products L.L.C.* turned on the court's application of the Administrative Procedure Act,[127] which provides that the court must determine whether the agency action was "arbitrary, capricious . . . or otherwise not in accordance with law," a highly deferential standard of review.[128] The district court found for the defendant, holding that the agency's actions in seizing the timber were not arbitrary and capricious.[129] The Circuit Court for the District of Columbia upheld the ruling.[130] Although *Castlewood Products L.L.C.* represents a victory against illegal logging, it does not represent the triumph of an anti-illegal logging statute.[131] Rather, it represents the judicial branch's deference to an agency action, a risky proposition in the age of agency capture.[132]

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[124] Castlewood Prods. v. Norton (*Castlewood Prods. I*), 264 F. Supp. 2d 9, 11–12 (D.D.C. 2003), *aff'd*, 365 F.3d 1076 (D.C. Cir. 2004). One of the plaintiffs in *Castlewood Products I*, Aljoma Lumber, Inc., supplies Honduran timber to Home Depot as tomato stakes and pine furring. ENVTL. INVESTIGATION AGENCY, THE ILLEGAL LOGGING CRISIS IN HONDURAS: HOW U.S. AND E.U. IMPORTS OF ILLEGAL HONDURAN WOOD INCREASE POVERTY, FUEL CORRUPTION AND DEVASTATE FORESTS AND COMMUNITIES 39 (2005) [hereinafter THE ILLEGAL LOGGING CRISIS], http://www.eia-international.org/wp-content/uploads/Honduras-Report-English-low-res.pdf [http://perma.cc/F6UW-AUH5] (providing data from 2005 report).

[125] *Castlewood Prods. II*, 365 F.3d at 1078.

[126] *Id.* at 1083.

[127] *See Native Fed'n of Madre De Dios River & Tributaries*, 491 F. Supp. 2d at 1185–86; *Castlewood Prods. II*, 365 F.3d at 1082.

[128] *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012).

[129] *Castlewood Prods. I*, 264 F. Supp. 2d at 12–14.

[130] *Castlewood Prods. II*, 365 F.3d at 1086.

[131] *See id.* at 1082–83 (holding that the agency's actions were permitted based on the application of the Administrative Procedure Act, rather than an anti-illegal logging statute).

[132] Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 676–77 (1983) (noting that if agencies have been "captured," courts should use a less deferential standard to avoid the risk that agencies are making decisions based on special interests, rather than expertise in the area). *See generally* GARY LAWSON, *Scope of Review of Agency Action, in* FEDERAL ADMINISTRATIVE LAW (6th ed. 2012) (describing various standards of review for determining how much deference is given to agency decisions in different contexts, and the factors that courts consider when determining how much deference to give agencies); Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1 (2013) (describing the evolution of the *Chevron* Doctrine, which determines the amount of deference appellate courts give to agency decisions and actions).

II. The Foreign Corrupt Practices Act: Its Expansive Anti-Bribery Provisions, Expanding Scope, and an Increasing Number of Prosecutions

The Foreign Corrupt Practices Act ("FCPA") was designed to combat global corruption and disincentivize United States corporations and businesses from engaging in bribery or corruption abroad.[133] It was intentionally drafted broadly to encompass a wide range of corrupt conduct.[134] There has been a recent increase in FCPA prosecutions, and an expansion of the reach of the Act's anti-bribery provisions.[135] The Act's expansive reach makes it a powerful instrument to take action against criminal activity that would otherwise be difficult to prosecute.[136]

The Foreign Corrupt Practices Act was passed in 1977, in the wake of the Watergate scandal.[137] It was part of a wider anti-corruption movement that took place domestically following Watergate.[138] The FCPA was passed following an investigation that showed massive and widespread bribery by United States interests abroad.[139] Congress was especially concerned by the fact that United States defense contractors and oil companies had made large payments to government officials in Japan, the Netherlands, and Italy.[140] These corrupt transactions posed three serious problems for the United States: undermining the economic interests of the countries where they occurred; preserving the integrity of world markets and the public's faith therein;[141] and "causing foreign policy problems for the United States."[142] The FCPA is generally seen as "a tool to combat global corruption . . . and counteract the incentives for United States companies to bribe foreign offi-

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[133] *See infra* notes 137–144 and accompanying text.

[134] *See infra* notes 145–194 and accompanying text.

[135] *See infra* notes 195–225 and accompanying text.

[136] *See infra* notes 226–301 and accompanying text.

[137] *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)–(h), 78dd-1–dd-3, 78ff (2012)); Judge Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on Its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 269, 271 (1998).

[138] *See* George D. Brown, *Putting Watergate Behind Us*—Salinas, Sun-Diamond*, and Two Views of the Anticorruption Model*, 74 TUL. L. REV. 747, 748–49 (2000) (noting that Watergate served as an impetus for many modern anti-corruption statutes); Carolyn Lindsey, *More Than You Bargained for: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U. L. REV. 959, 961 (2009).

[139] H.R. REP. NO. 95-640, at 4–5 (1977); S. REP. NO. 95-114, at 1–3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4098–4101.

[140] H.R. REP. No. 95-640, at 5; S. REP. NO. 95-114, at 3–4.

[141] *See* H.R. REP. NO. 95-640, at 4–5; S. REP. NO. 95-114, at 3–4.

[142] United States v. Kay, 359 F.3d 738, 746 (5th Cir. 2004).

cials."[143] In addition to reducing the harm of corruption caused by United States companies abroad, the FCPA was also intended to "bolster the global image of the [United States]" and "strengthen [our] relationships with our allies."[144]

The FCPA of 1977 criminalizes the extraterritorial payment of bribes by domestic companies and their agents.[145] It prohibits payments to foreign officials for purposes of:

> (i) [I]nfluencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage . . . in order to assist [the company making the payment] in obtaining or retaining business for or with, or directing business to, any person . . . .[146]

The FCPA prohibits "use of the mails or any means or instrumentality of interstate commerce" in furtherance of the prohibited acts.[147] Although the FCPA is a domestic criminal statute, its reach extends to any foreign company or individual, provided that some of the acts of bribery, or other acts in furtherance of them, take place in the United States.[148] Thus, in addition to bribes between United States corporations and foreign government officials, bribes between foreign actors on foreign soil can be within the reach of the FCPA, if so much as an email, phone call, or use of a United States cell phone carrier was used in the transaction.[149] FCPA violations can result in fines or incarceration.[150]

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[143] Ivan Perkins, *Illuminating Corruption Pathways: Modifying the FCPA's "Grease Payment" Exception to Galvanize Anti-Corruption Movements in Developing Nations*, 21 CARDOZO J. INT'L & COMP. L. 325, 325 (2013).

[144] *Id.* at 325–26.

[145] 15 U.S.C. § 78dd-1(a)(1) (2012); Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 231 (1997).

[146] 15 U.S.C. § 78dd-1(a)(1). These prohibitions apply to "issuers." *Id.* Issuers are defined by statute as companies that have a class of securities registered with the SEC, pursuant to securities laws, or a company that is required to file reports with the SEC, pursuant to securities laws. *See id.* § 78c(a)(8); *see also* Mike Koehler, *Understanding Issuers*, FCPA PROFESSOR (Feb. 22, 2010, 1:38 PM), http://fcpaprofessor.blogspot.com/2010/02/understanding-issuers.html [http://perma.cc/CL78-JX7H].

[147] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

[148] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 10–11 (2012) [hereinafter RESOURCE GUIDE], http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf [http://perma.cc/WS62-FB8S]; H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?*, 26 N.C.J. INT'L L. & COM. REG. 239, 288–89 (2001).

[149] *See* Irina Sivachenko, Note, *Corporate Victims of "Victimless Crime": How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance*, 54 B.C. L. REV. 393, 400 (2013); *see also* Anastasia Telesetsky, *Laundering Fish in the*

The FCPA anti-bribery provisions are comprised of three essential elements: it prohibits giving "anything of value" to a "foreign official" for the purposes of "obtaining or retaining business."[151]

A. Meaning of "Foreign Official" Under the FCPA

The FCPA prohibits payments to "foreign officials," which it defines as:

> [A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[152]

It is not disputed that heads of state and state agents with an official title (Minister of Defense, Customs Enforcement Official, etc.) are foreign officials for the purposes of the FCPA.[153] Beyond that, both the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) have brought cases against employees of foreign companies.[154] In the majority of FCPA enforcement actions in 2009, the "foreign officials" implicated were actually employees of state-owned enterprises or state-controlled enterprises.[155] This definition of "foreign official" is based on the theory that the state-owned or state-controlled enterprise is an "instrumentality" of the foreign government.[156] The FCPA does not define the term "instrumentality."[157]

The most recent guidance on the meaning of "foreign official" under the FCPA is from a district court case, *United States v. Aguilar*.[158] In *Agui-*

Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime, 41 ECOLOGY L.Q. 939, 988 (2014) (arguing that the FCPA could be used to prosecute foreign actors on U.S. soil for engaging in transnational environmental crime).

[150] 15 U.S.C. § 78dd-2(g)(1)–(3).

[151] *Id.* § 78dd-1(a); *see* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 390 (2010).

[152] 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

[153] Joel M. Cohen et al., *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1245 (2008); Koehler, *supra* note 151, at 391.

[154] Cohen et al., *supra* note 153, at 1245–46.

[155] Koehler, *supra* note 151, at 391.

[156] *Id.* at 391–92.

[157] United States v. Aguilar, 783 F. Supp. 2d 1108, 1112 (C.D. Cal. 2011). The Lindsey defendants' convictions were ultimately overturned on the grounds of prosecutorial misconduct; the holding regarding proper interpretation of the FCPA should not be affected. *See* United States v. Aguilar, 831 F. Supp. 2d 1180, 1210 (C.D. Cal. 2011).

[158] *See* 783 F. Supp. 2d at 1116–17.

lar, the government charged three defendants—two individuals and a United States company (collectively, "the Lindsey defendants") with conspiracy to violate the FCPA and substantive violations of the FCPA.[159] The Lindsey defendants were accused of paying bribes to two senior level employees of Comisión Federal de Electricidad ("CFE"), an electric utility company wholly owned by the Mexican government.[160] The defendants did not dispute that, under the Mexican Constitution, the government is solely responsible for providing electricity.[161] Instead, the defendants contended that, even accepting the government's allegations regarding the FCPA violations as true, no state-owned corporation, as a matter of law, is an "instrumentality" of the state, and therefore no CFE employee could be a "foreign official" under the FCPA.[162]

In *Aguilar*, defendants made an "all or nothing" argument that state-owned corporations could never be instrumentalities because not all state-owned corporations shared characteristics with "departments" or "agencies."[163] The United States District Court for the Central District of California rejected this argument, pointing out some of the many characteristics that can be true of "departments," "agencies," and state-owned corporations:

> [1] The entity provides a service to the citizens—indeed, in many cases to all the inhabitants—of the jurisdiction. [2] The key officers and directors of the entity are, or are appointed by, government officials. [3] The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park. [4] The entity is vested with and exercises exclusive or controlling power to administer its designated functions. [5] The entity is widely perceived and understood to be performing official (*i.e.*, governmental) functions.[164]

The court held that the structure, object, and purpose of the FCPA are consistent with a definition of instrumentality that includes at least some state-owned corporations, including CFE, the corporation at issue in that case.[165]

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[159] *Id.* at 1109.
[160] *Id.*
[161] *Id.* at 1112.
[162] *Id.* at 1110.
[163] *Id.* at 1114–16.
[164] *Id.* at 1115.
[165] *Id.* at 1117.

This holding vastly expanded the possible foreign actors who could satisfy the "foreign official" element of the FCPA.[166]

B. Meaning of "Obtaining or Retaining Business" —The Business-Nexus Requirement Under the FCPA

As stated above, the FCPA prohibits offering or paying a foreign official anything of value for the purposes of:

> (i) [I]nfluencing any act or decision of such foreign official . . . (ii) inducing such foreign official . . . to do or omit to do any act in violation of the lawful duty of such foreign official . . . or (iii) securing any improper advantage; or . . . inducing such foreign official . . . to use his . . . influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, *in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person*.[167]

In *United States v. Kay*, the United States Court of Appeals for the Fifth Circuit had the opportunity to resolve the interpretation of the so-called "business-nexus" element of the FCPA—the bribe must be meant to "assist in obtaining or retaining business."[168] The question at issue in *Kay* was whether illicit payments to foreign officials for the purpose of avoiding customs duties and sales taxes to obtain or retain business are the type of bribe the FCPA criminalizes.[169] The court found that the language of the statute was ambiguous and proceeded to analyze the legislative history.[170]

The defendant in *Kay* was David Kay, an American citizen and the vice-president of marketing for American Rice, Inc. ("ARI").[171] ARI is an American company that exports rice to foreign countries, including Haiti.[172] Rice Corporation of Haiti is a wholly-owned subsidiary of ARI, incorporated in Haiti to represent ARI's interests there.[173] As part of Haiti's standard goods importation procedure, Haiti's customs officials assess duties

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[166] *See* Cyavash Nasir Ahmadi, Note, *Regulating the Regulators: A Solution to Foreign Corrupt Practices Act Woes*, 11 J. INT'L BUS. & L. 351, 355 (2012); Elizabeth Grant, Comment, *Ignoring the Technicality's Temptation: Interpreting the Citizenship of a Foreign Official Under the Foreign Corrupt Practices Act*, 2 AM. U. BUS. L. REV. 389, 413 (2013).

[167] 15 U.S.C. § 78dd-1(a)(3) (2012) (emphasis added).

[168] *Id.*; United States v. Kay, 359 F.3d 738, 740 (5th Cir. 2004).

[169] *Kay*, 359 F.3d at 740.

[170] *Id.* at 743–44.

[171] *Id.* at 762.

[172] *Id.* at 740.

[173] *Id.*

based on the quantity and quality of the rice, as well as sales taxes.[174] Defendants were two senior level officers of ARI.[175] They were charged with FCPA violations for bribing Haitian customs officials to accept false bills of lading[176] that understated the quantity of rice shipped to Haiti, thus reducing ARI's customs duties and sales tax.[177] Despite laying out in great detail the facts of the bribery scheme, the indictment in question only asserted that the bribes were meant to assist in "obtaining or retaining business" for ARI, without any further facts to support that assertion.[178]

The defendants argued against a broad interpretation of the business-nexus requirement, and contended that the bare assertion that the bribery scheme was meant to assist ARI in "obtaining or retaining business" did not fulfill this element of the alleged FCPA violation.[179] The government argued that, as lowered tax and customs payments increase a company's profit margin, they should automatically satisfy the business-nexus element.[180] The court accepted neither position.[181] Instead, the court held that bribes intended to lower customs or sales tax payments could fall within the type of bribes Congress intended to criminalize with the FCPA, but that the nexus between these payments and the "obtaining or retaining business" had to be explicitly laid out in the indictment.[182]

C. The "Grease Payments" Exception to the FCPA and Other Defenses

Though Congress intended to criminalize bribery that assisted businesses in "obtaining or retaining business for or with . . . any person,"[183] it did not intend to prohibit payments for routine governmental action, often referred to as "grease or facilitation payments."[184] The statute explicitly provides an exception for "any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official . . . ." [185] The

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[174] *Id.*

[175] *Id.* at 762.

[176] *Bill of Lading*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining bill of lading as a "document acknowledging the receipt of goods by a carrier or by the shipper's agent and the contract for the transportation of those goods; a document that indicates the receipt of goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods.").

[177] *Kay*, 359 F.3d at 741.

[178] *Id.* at 756–64 (the court attached the indictment as Appendix A to the opinion).

[179] *Id.* at 743, 756.

[180] *Id.* at 759.

[181] *Id.* at 759–60.

[182] *Id.*

[183] 15 U.S.C. § 78dd-1(a)(3) (2012).

[184] *Id.* § 78dd-1(b); S. REP. NO. 95-114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.

[185] 15 U.S.C. § 78dd-1(b).

term "routine governmental action" is further clarified by Section 78dd–1(f)(3)(A), which provides examples of such actions, including:

> (i) [O]btaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.[186]

The legislative history of this section provides further insight into what actions may be permissible grease payments.[187] For example, the report of the United States Senate Committee on Banking, Housing, and Urban Affairs indicates that grease payments might include "payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties."[188]

In *Kay*, the Fifth Circuit characterized this exception as "narrowly drawn . . . carving out very limited categories of permissible payments from an otherwise broad statutory prohibition."[189] The *Kay* court analyzed the legislative history, and explained that Congress's use of the "corruptly" mens rea standard was intended to punish bribes that persuaded a government official to misuse their discretionary authority. [190] In contrast, the standard was not intended to punish payments made simply to hasten an action or decision that would have happened without the bribe.[191]

The 1988 amendments to the FCPA provided defendants with two affirmative defenses.[192] First, there was no violation of the FCPA if the payment in question was lawful under the written laws of the foreign country.[193] Second, there was no violation if the exchange of "anything of value" was payment for a bone fide business expense, such as travel or lodging.[194]

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[186] *Id.* § 78dd-1(f)(3)(A).
[187] S. REP. NO. 95–114, at 10.
[188] *Id.*
[189] United States v. Kay, 359 F.3d 738, 745 (5th Cir. 2004).
[190] *Id.* at 746–47 (analyzing H.R. REP. NO. 95–640, at 7–8 and S. REP. NO. 95–114, at 10).
[191] *Id.*
[192] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003(a), 102 Stat. 1107, 1420–21 (codified with some differences in language at 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2012)); Salbu, *supra* note 145, at 246–47.
[193] 15 U.S.C. § 78dd-2(c)(1).
[194] *Id.* § 78dd-2(c)(2).

D. The Exponential Increase in FCPA Enforcement Actions

The SEC is responsible for the civil enforcement of the FCPA, including its anti-bribery and books and records provisions.[195] The DOJ is responsible for all criminal enforcement of the statute, and the enforcement of the civil anti-bribery provisions against non-issuers.[196] Between its passage in 1977 and 2002, FCPA enforcement was minimal, with few cases being brought under the statute.[197] Between 2002 and 2014, however, both civil and criminal enforcement actions increased exponentially.[198] Many factors have contributed to this increase in enforcement, including: corporate scandals such as Enron and WorldCom, enhanced scrutiny of international transactions under the United States Patriot Act, the rapid economic growth of China, and attendant increase of United States business in China.[199]

The FCPA can serve as a powerful tool for a prosecutor, due to the frequent use of the DOJ non-prosecution agreements ("NPAs") and deferred prosecution agreements ("DPAs"), which, according to some commentators, have led to "virtually non-existent" judicial scrutiny of the government's theories of FCPA violations.[200] Use of NPAs and DPAs has "exploded in recent years."[201] The DOJ's increased use of NPAs and DPAs is a further indication of the DOJ's increasingly aggressive enforcement of the FCPA.[202] NPAs are privately negotiated agreements between the DOJ and the defendant business entity without any judicial involvement.[203] Similarly, DPAs are privately negotiated agreements in which the DOJ declines to pursue prosecution for a period of time (several years), and the corporate entity admits responsibility for the conduct being alleged.[204] The key dis-

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[195] *See id.* § 78m(b)(6) (laying out provisions requiring companies to keep accurate records and reports of financial dealings). This Note only addresses a possible use of the FCPA's anti-bribery provisions to criminally prosecute illegal logging, not the FCPA's civil provisions.

[196] OFFICE OF INV'R EDUC. & ADVOCACY, U.S. SEC. & EXCH. COMM'N, INVESTOR BULLETIN: THE FOREIGN CORRUPT PRACTICES ACT—PROHIBITION OF THE PAYMENT OF BRIBES TO FOREIGN OFFICIALS 3 (2011), http://www.sec.gov/investor/alerts/fcpa.pdf [http://perma.cc/AQ2Q-4JCR].

[197] PHILIP UROFSKY & DANFORTH NEWCOMB, SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 2–10 (2009), http://www.shearman.com/~/media/Files/Old-Site-Files/LT100209FCPADigestRecentTrendsandPatternsinFCPAEnforcement.pdf [http://perma.cc/NJC5-SB3A].

[198] *See* SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 2–4 (2014), http://www.shearman.com/~/media/Files/NewsInsights/Publications/2014/07/Recent-Trends-and-Patterns-FCPA-Digest-LT-072114.pdf [http://perma.cc/7EDM-3HB3].

[199] Perkins, *supra* note 143, at 333.

[200] *See* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 909–10 (2010).

[201] *Id.* at 933.

[202] *See id.* at 933–34.

[203] *Id.*

[204] *Id.*

tinction between NPAs and DPAs is that DPAs are filed with the court.[205] DPAs and NPAs allow the defendant to agree to follow compliance requirements, usually including a fine, for a set period of time, in exchange for which the prosecutor will either defer or forgo prosecution.[206] By foregoing legal action, the prosecution's theory goes untested by judicial scrutiny.[207]

E. Expansive Reach of the FCPA

In 2012, the SEC brought a civil enforcement action against officers of an offshore drilling company that was operating in Nigerian waters, alleging violations of the FCPA's anti-bribery provisions.[208] In *Securities and Exchange Commission v. Jackson*, the defendants were current and former employees of Noble Corporation ("Noble").[209] Noble is a provider of offshore drilling services and equipment.[210] To legally operate drilling rigs offshore in Nigeria, the owner of the rig must pay permanent import duties or get a temporary import permit ("TIP").[211] TIPs allow the rigs to operate without paying import duties, and are by law permitted only for rigs that intend to be in the country for less than one year, with a limited number of extensions possible.[212] The SEC alleged that Noble-Nigeria (a subsidiary of Noble) authorized a customs agent to pay bribes to Nigerian government officials to obtain the false documentation Noble-Nigeria needed to get TIPs, and thus avoid the payment of import duties.[213] Defendants Jackson and Ruehlen, employees of Noble-Nigeria, approved numerous "special handling" and "procurement" payments to government officials to obtain the false paperwork.[214] For this conduct, defendants were charged with violations of the FCPA's anti-bribery provisions.[215]

Defendants argued that the complaint failed to allege: (1) the involvement of a "foreign official"; (2) that the payments were not "facilitation" (grease) payments; and (3) that the defendants had the requisite "corruptly"

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[205] *Id.*

[206] Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 439–40 (2010).

[207] *Id.*

[208] S.E.C. v. Jackson, 908 F. Supp. 2d 834, 839–40 (S.D. Tex. 2012).

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *Id.* at 839. Defendants were charged under 15 U.S.C. § 78dd-1(a)(1), and with committing other violations. 15 U.S.C. § 78dd-1(a)(1) (2012); *Jackson*, 908 F. Supp. 2d at 840.

mens rea.[216] The United States District Court for the Southern District of Texas analyzed the plain language of the statute and the legislative history, and found that "the language of the statute does not appear to require that the identity of the foreign official involved be pled with specificity."[217] Because the FCPA required that the "thing of value" be given for the purpose of influencing an official act or decision of the foreign official, the court explained that in some cases it may be necessary to plead details of the foreign official's identity.[218]

The *Jackson* court also provided instruction regarding the "knowingly" mens rea required by the statute.[219] Analyzing the legislative history, the court found that Congress intended to prohibit actions taken with actual knowledge, as well as actions taken when there was evidence of "a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act."[220]

Under the FCPA, a parent company's liability for a subsidiary company that violated the anti-bribery provisions was originally based on the theory that the subsidiary acted under the parent company's authorization, direction, or control.[221] As the reach of the FCPA has continued to expand, the government has sought to hold parent companies liable for the actions of its subsidiaries without showing knowledge of or participation in the criminal conduct.[222] The DOJ made this policy official in the November 2012 Resource Guide to the U.S. Foreign Corrupt Practices Act, in which it asserted that a parent company may be liable under the FCPA's anti-bribery provisions "under traditional agency principles," as well as when it was shown to participate in the illegal conduct.[223] One commentator has suggested that this expanded parent company liability is part of "a steady progression toward a strict liability FCPA regime."[224] Other scholars have commented

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[216] *Jackson*, 908 F. Supp. 2d at 848–49. The court did not resolve the question of whether the SEC has the burden of alleging that the bribes at issue were not facilitation payments in every case, finding that in this case the SEC's pleading sufficiently alleged that the defendants' actions were knowingly undertaken in violation of Nigerian law. *Id.* at 858–59.

[217] *Id.* at 849–50.

[218] *Id.* at 849.

[219] *Id.* at 849–50.

[220] *Id.* at 850 (quoting H.R. REP. 100-576 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A. 1547).

[221] Gregory M. Williams, *The Alcoa FCPA Settlement: Are We Entering Strict Liability Anti-Bribery Regime?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 5, 2014), http://blogs.law.harvard.edu/corpgov/2014/02/05/the-alcoa-fcpa-settlement-are-we-entering-strict-liability-anti-bribery-regime/ [http://perma.cc/K7R3-HBRF].

[222] *Id.*

[223] RESOURCE GUIDE, *supra* note 148, at 27–28.

[224] Williams, *supra* note 221; *see also* Sivachenko, *supra* note 149, at 403–04 (criticizing the use of "strict liability" against parent companies for subsidiaries' FCPA violations).

positively on the use of strict liability in the FCPA context, arguing that it is the best way to prevent corporate bribery, by shifting the risk of liability to those best able to prevent the conduct.[225]

III. Potential Use of the Foreign Corrupt Practices Act to Break the Cycle of Illegal Logging

Due to the Foreign Corrupt Practices Act's ("FCPA") expansive reach and undemanding mens rea requirement, it can be used effectively to minimize the United States' role in transnational illegal logging.[226] Bribery and corruption in the illegal logging context could be prosecuted under the FCPA.[227] At present, there are no reported cases in which the FCPA has been used to prosecute the importers of illegal timber.[228] Looking to wildlife trafficking cases, however, provides two important insights.[229] First, it highlights why the Lacey Act can be used successfully to prosecute wildlife trafficking but not necessarily to prosecute actors engaged in the illegal timber trade.[230] Second, it shows that many of the wildlife trafficking cases could have been brought under the FCPA instead of, or in addition to, the Lacey Act.[231] Comparing the fact patterns of wildlife trafficking cases with what is known about the transnational illegal logging trade indicates that the FCPA can be a potent tool to fight illegal logging.[232] The failures of previous attempts to stem the flow of illegal logging in the United States, along with the profound and irreversible impacts of illegal logging, require the United States to harness untraditional methods to prosecute illegal logging.[233] Now is the time to use the FCPA to begin a new era of illegal logging prosecutions.[234]

As early as 1999, well before the recent upswing in FCPA prosecutions, commentators noted its potential use in combating illegal logging.[235] Given the nexus between bribery, corruption, and illegal logging, and the potential for FCPA violations in any environmental law case involving

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[225] *See, e.g.*, Lena E. Smith, Note, *Is Strict Liability the Answer in the Battle Against Foreign Corporate Bribery?*, 79 BROOK. L. REV. 1801, 1827–31 (2014) (providing an overview of the debate between scholars who support the trend in increasing FCPA enforcement actions, and those who believe that this enforcement creates too high a cost of doing business in the United States marketplace).

[226] *See infra* notes 235–301 and accompanying text.

[227] *See infra* notes 235–301 and accompanying text.

[228] *See infra* notes 235–301 and accompanying text.

[229] *See infra* notes 235–301 and accompanying text.

[230] *See infra* notes 235–301 and accompanying text.

[231] *See infra* notes 235–301 and accompanying text.

[232] *See infra* notes 235–301 and accompanying text.

[233] *See infra* notes 235–301 and accompanying text.

[234] *See infra* notes 235–301 and accompanying text.

[235] *See, e.g.*, CALLISTER, *supra* note 23, at 27.

Lacey Act violations and bribery of foreign officials, some scholars have suggested that the Department of Justice (DOJ) will begin prosecuting environmental crimes, such as illegal logging, using the FCPA.[236] Despite the argument that environmental crimes such as illegal logging depend on bribery and corruption and thus inherently implicate the FCPA, there have been no prosecutions of such crimes under the FCPA to date.[237]

A. Bribery in the Illegal Wildlife Trafficking Context Could Be Charged Under the FCPA

Prosecutions under the Lacey Act and the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") for wildlife trafficking involving acts of bribery and corruption provide a useful example of conduct that could also be tried under the FCPA.[238] Bribery is often part of schemes to illegally import wildlife.[239] In *United States v. Labs of Virginia*, the defendant was a U.S.-based laboratory that bred and sold primates for medical research.[240] Defendants sought to acquire a breeding colony of long-tail, crab-eating macaque monkeys from Inquatex, an Indonesian company.[241] Defendant Labs of Virginia and individual defendants David Taub, Charles Stern, and William Henley III, employees of the lab, were charged with violating several provisions of the Lacey Act, and several other import laws.[242] Stern and Henley were also charged with illegal trafficking of species protected by Indonesian law.[243] The United States District Court for the Northern District of Illinois denied defendants' motion to dismiss.[244] The export of wild-caught macaque monkeys was illegal under

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[236] *See, e.g.*, Asner et al., *supra* note 30, at B-2 to B-4; Brown, *supra* note 38, at 265–66 (suggesting that the DOJ should use the FCPA to prosecute timber companies paying bribes to log in protected areas).

[237] *See* Asner et al., *supra* note 30, at B-3 (discussing the absence of prosecutions of illegal logging under the FCPA and Lacey Act together, and suggesting that such prosecutions could be "just around the corner").

[238] *See, e.g.*, United States v. Bengis, 631 F.3d 33, 33–37 (2d Cir. 2011); United States v. Kum, 309 F. Supp. 2d 1084, 1086–87 (E.D. Wis. 2004); United States v. Labs of Va., Inc., 272 F. Supp. 2d 764, 766–67 (N.D. Ill. 2003).

[239] *See, e.g.*, *Bengis*, 631 F.3d at 33–37; *Kum*, 309 F. Supp. 2d at 1087; *Labs of Va., Inc*., 272 F. Supp. 2d at 766–67.

[240] 272 F. Supp. 2d at 767.

[241] *Id.*

[242] *Id.* at 767–68. Defendants were charged with violating 16 U.S.C. § 3371*,* 18 U.S.C. § 545, 50 C.F.R. § 14.105(b)(2), and 16 U.S.C. § 3372(a)(2)(A). *Id.*

[243] *Id.*

[244] *Id.* at 772. The Lacey Act analysis here is not salient to the topic of this Note, as the importance of this case is the conduct of the defendants, which provides an example of trafficking activity that could also result in FCPA charges. *Id.* at 767–68. Defendant Labs of Virginia entered into a plea agreement with the United States; all charges against the individual defendants—the

Indonesian law.[245] An employee informed defendants that the export of the monkeys was illegal, and that the Indonesian company had "bribed government officials to obtain permits for their release."[246] The lab proceeded to complete the purchase and import the monkeys.[247]

In *United States v. Kum*, another wildlife trafficking case involving bribery, there was evidence showing that the defendant bribed Thai government officials to facilitate the smuggling of "girls" and wildlife.[248] Defendant was found to have violated CITES and other import laws.[249] In *Kum*, the defendant was Leong Tian Kum, a Singaporean resident of Thailand.[250] He was charged with smuggling and money laundering offenses for conspiring with others to illegally import protected wildlife into the United States from Thailand, in order to sell in the United States market.[251] The defendant had acquired protected species of tortoises, turtles, and slow loris in order to sell them in the United States and Europe in the illegal pet trade.[252] Several of the individuals who received these animals went on to resell them.[253] The government introduced the defendant's emails at trial, which showed that the defendant had bribed Thai officials to facilitate the smuggling.[254]

In *United States v. Bengis*, the defendants were convicted of the illegal harvest of large quantities of rock lobsters in South Africa—intended for export to the United States—in violation of the South Africa Marine Living Resources Act and United States law.[255] Between 1987 and 2001, Arnold Bengis, Jeffery Noll, and David Bengis led an "elaborate" scheme to illegally harvest large quantities of rock lobsters in South African waters for export to the United States, a scheme that violated both United States and South African law.[256] Arnold Bengis was the Chairman of Hout Bay Fishing

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lab employees—were ultimately dismissed. *See* Plea Agreement, *Labs of Va., Inc.*, 272 F. Supp. 2d 764 (No. 02-312); Order, *Labs of Va., Inc.*, 272 F. Supp. 2d 764 (No. 02-312).

[245] *Labs of Va., Inc.*, 272 F. Supp. 2d at 768.

[246] *Id.* at 767.

[247] *Id.*

[248] 309 F. Supp. 2d 1084, 1087 (E.D. Wis. 2004)

[249] *See id.* at 1092–93.

[250] *Id.* at 1085.

[251] *Id.* Defendant pled guilty to one count of conspiracy to smuggle wildlife into the United States under 18 U.S.C. §§ 371 and 545 and one count of money laundering under 18 U.S.C. § 1956(a)(2)(A). *Id.*

[252] *Id. at* 1086.

[253] *Id.*

[254] *Id.* at 1087.

[255] United States v. Bengis, 631 F.3d 33, 36–37 (2d Cir. 2011). Again, the Lacey Act analysis here is not salient to the topic of this Note, as the importance of this case is the conduct of the defendants, which provides an example of trafficking activity that could also result in FCPA charges. *See id.* at 33–37.

[256] *Id.* at 35.

Industries, a fishing company through which the defendants organized their lobster exportation scheme.[257] The other two defendants, Jeffery Noll and David Bengis, were presidents of two United States corporations that imported and distributed fish within the United States for Hout Bay.[258] Defendants directed Hout Bay to harvest rock lobsters in amounts beyond the authorized quota.[259] A South African court found that Hout Bay, the South African company that harvested the lobsters for the United States corporations, bribed a number of fisherman and fisheries inspectors in furtherance of the scheme.[260]

In *Bengis*, all three defendants were indicted in the United States.[261] Arnold Bengis and Noll pleaded guilty to conspiracy to violate the Lacey Act and to commit smuggling in violation of 18 U.S.C. § 371 and violations of the Lacey Act, 16 U.S.C. § 3372(a)(2)(A), and David Bengis pleaded guilty to the conspiracy charge.[262] Despite the evidence of bribery and the finding of a violation of a foreign law, defendants were not charged under the FCPA.[263] As an attorney who prosecuted *Bengis* has observed, although the defendants were not charged with FCPA violations, their conduct was sufficient to warrant such charges.[264]

Bengis, *Kum*, and *Labs of Virginia* are examples of wildlife trafficking cases in which the defendants could have been charged with a violation of the anti-bribery provisions of the FCPA, which prohibits payments to foreign officials for purposes of:

> (i) [I]nfluencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage . . . in order to assist [the company making the payment] in obtaining or retaining business for or with, or directing business to, any person.[265]

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[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.* at 36.
[261] *Id.*
[262] *Id.*; *see* 16 U.S.C. § 3372(a)(2)(A) (2012); 18 U.S.C. § 371 (2012).
[263] *See* Asner et al., *supra* note 30, at B-3 to B-4. *See generally Bengis*, 631 F.3d 33 (discussing charges under the Lacey Act, implicitly indicating no charges were brought under the FCPA).
[264] *See* Asner et al., *supra* note 30, at B-2 to B-3. Marcus Asner, who prosecuted *Bengis* while an Assistant United States Attorney in the Southern District of New York, has argued that the facts of *Bengis*, along with how "broadly [the FCPA] was drafted and how vigorously it is enforced," could have allowed for an FCPA prosecution in the case. *See id.* at B-3 to B-4.
[265] 15 U.S.C. § 78dd-1(a)(1) (2012); *see Bengis*, 631 F.3d at 33–37; United States v. Kum, 309 F. Supp. 2d 1084, 1087 (E.D. Wis. 2004); United States v. Labs of Va., Inc., 272 F. Supp. 2d 764, 766–67 (N.D. Ill. 2003).

The defendants in *Bengis* and *Labs of Virginia* could have been charged as issuers or domestic concerns.[266] The defendant in *Kum* was arrested during a trip to the United States to arrange for the sale of wildlife.[267] The defendant, a Singaporean residing in Thailand, could have been charged under the territorial jurisdiction of the FCPA, which extends to foreign persons that engage in any act in furtherance of a corrupt payment while in the territory of the United States.[268] In each case, the defendants either paid directly or were aware of a payment to a foreign official in order to influence an act of such official in their official capacity to secure an improper advantage, in order to obtain or retain business.[269]

Although *Labs of Virginia* and *Bengis* provide examples of wildlife trafficking conduct that could be prosecuted under both the Lacey Act and the FCPA,[270] the Lacey Act would most likely not be suitable for prosecution of similar conduct involving illegal logging and bribery, given the uncertainty surrounding the Lacey Act's "due care" standard as applied to the timber industry and the almost total absence of any such Lacey Act prosecutions.[271] The FCPA, however, could be used effectively to prosecute similar fact patterns involving bribery and smuggling in the illegal logging context.[272]

B. Examples of Bribery and Corruption in the Illegal Logging Sector

A 2012 Environmental Investigation Agency ("EIA") report provides a specific example of bribes being demanded for an official report reflecting favorably on a Peruvian logging operation.[273] A 2007 Washington Post investigative report described bribes being paid to access teak in Burma, which was then illegally logged, exported, and ultimately ended up for sale

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[266] *See* 15 U.S.C. §§ 78(c)(a)(8) (defining issuer and concern), 78dd-2 (providing that the FCPA anti-bribery provisions apply to domestic concerns); *Bengis*, 631 F.3d at 33–37; *Labs of Va., Inc.*, 272 F. Supp. 2d at 766–67. Dependent on the type of corporate defendant (i.e. issuer or domestic concern), it could be charged under the appropriate section of the FCPA, which is applicable to both. *Id.*

[267] *Kum*, 309 F. Supp. 2d at 1087.

[268] *See id.*; RESOURCE GUIDE, *supra* note 148, at 10–11. Defendant Leong Tiam King could be charged under the FCPA had he been associated with a business or concern as defined by the statute, rather than a criminal enterprise. *See* RESOURCE GUIDE, *supra* note 148, at 10–11; Brown, *supra* note 148, at 288–89.

[269] *See Bengis*, 631 F.3d at 33–37; *Kum*, 309 F. Supp. 2d at 1087; *Labs of Va., Inc*., 272 F. Supp. 2d at 766–67.

[270] *See supra* notes 238–247, 255–264 and accompanying text.

[271] *See supra* notes 90–102 and accompanying text.

[272] *See generally* Asner et al., *supra* note 30 (discussing the similarities between the use of bribery in the wildlife and timber contexts and how the FCPA could be used to prosecute cases in both areas).

[273] URRUNAGA ET AL., *supra* note 9, at 50.

from United States retailers including Home Depot, Lowes, and IKEA.[274] A 2005 EIA report describes bribes being paid by illegal loggers in Honduras to flout local logging regulations.[275] The report also details the bribes paid by a mahogany trafficker in Honduras.[276] The report further describes how Caoba de Honduras, the largest exporter of mahogany in Honduras, participates in illegal logging.[277] Caoba de Honduras manufactures and ships luxury hardwood furniture to many U.S. furniture companies, including Baker, Hickory, Lexington, and Century Furniture.[278] Caoba de Honduras acknowledges that illegal logging is a significant challenge, stating, "Right now, it's a problem . . . because all the laws here are not very good . . . in [the] forest [sector]; there is a lot of corruption."[279] At that time, the United States was the largest single consumer of Honduran wood products.[280] United States distributors of Honduran timber products include Home Depot, K-Mart, Ace Hardware, True Value Hardware, Macy's Furniture Gallery, Babies "R" Us, LL Bean, Brookstone, Target, Sears, and Burlington Coat Factory.[281]

Reports from around the world detail the relationship between bribery and illegal logging in many different countries.[282] In Indonesia, one report suggests that bribes are used in a number of contexts, including: illegal loggers paying bribes to officials at timber checkpoints; illegal loggers paying

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[274] Peter S. Goodman & Peter Finn, *Corruption Stains Timber Trade*, WASH. POST (Apr. 1, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/03/31/AR2007033101287.html [http://perma.cc/J3AD-PH65]. The author is referring to IKEA as a United States retailer because IKEA operates through IKEA Holdings US, Inc. in the United States, where it is incorporated in Pennsylvania; IKEA Holdings US, Inc. operates as a subsidiary of INGKA Holding B.V. *Company Overview of IKEA Holdings US, Inc.*, BLOOMBERG BUS., (Jan. 11, 2016, 10:44 PM), http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapid=856351 [perma.cc/BFB2-JEDL].

[275] *See* THE ILLEGAL LOGGING CRISIS, *supra* note 124, at 14.

[276] *Id.* at 18.

[277] *Id.* at 36–37.

[278] *Id.* at 36.

[279] *Id.* at 37 (alterations in original).

[280] *Id.* at 38. All data is from the time of the report, Oct. 2005. *Id.* at 2–3.

[281] *Id.* at 39 (providing a non-exhaustive list).

[282] *See, e.g.*, BAMBANG SETIONO & YUNUS HUSEIN, CTR. FOR INT'L FORESTRY RESEARCH, FIGHTING FOREST CRIME AND PROMOTING PRUDENT BANKING FOR SUSTAINABLE FOREST MANAGEMENT: THE ANTI MONEY LAUNDERING APPROACH 9–22 (2005), http://www.cifor.org/publications/pdf_files/OccPapers/OP-44.pdf [http://perma.cc/XPK8-4ZR9] (describing bribes in the forest sector in Indonesia, including bribes to judges and prosecutors, bribes to government officials and banks, and bribes to officials for timber extraction licenses); ASIA PAC. GRP. ON MONEY LAUNDERING (APG), TYPOLOGIES REPORT: ILLEGAL LOGGING AND MONEY LAUNDERING ISSUES 5–6 (2008) (describing bribery and illegal logging in Indonesia and Malaysia); WORLD BANK, WOOD SUPPLY IN MONGOLIA: THE LEGAL AND ILLEGAL ECONOMIES 42–44 (2006) [hereinafter WOOD SUPPLY IN MONGOLIA], http://siteresources.worldbank.org/MONGOLIAEXTN/Resources/mong_timber_int_for_web.pdf [http://perma.cc/CN7Z-ZCRM] (detailing types of bribes, bribe recipients, and bribe amounts).

bribes to judges and prosecutors to avoid being charged with illegal logging crimes or for favorable judicial decisions; and bribes paid to government officers to get timber extraction licenses.[283] A World Bank report from Mongolia describes in detail the use of bribes in many situations in the illegal logging industry, including: to ensure selection for a logging license; purchase of a false certificate of origin for timber to be exported; arrangement with a forest ranger to not observe illegal logging; to secure release if caught by a forest ranger; to pass through timber checkpoints; to obtain papers to pass through timber checkpoints; and to avoid being caught by timber inspectors.[284] In Mongolia, such bribes are paid to many government officials, including the Ministry of Nature and the Environment, forest rangers, police officers, and timber inspectors.[285] The United States imports wood from all around the world, including Indonesia,[286] Malaysia,[287] and Mongolia.[288] As a leading importer of timber and wood products, the United States is an active participant in the transnational illegal logging industry.[289]

C. Bribery in the Illegal Logging Context Could Be Charged Under the FCPA

Just as the FCPA could be used to prosecute wildlife trafficking schemes involving bribery, it could also be used to prosecute illegal logging where United States corporations are part of the supply chain, the mens rea requirement is met, and a bribe is paid to a foreign official to influence a decision or action that would not otherwise have been taken.[290] There is evidence to suggest that United States companies are importing and distributing timber that may have been illegally logged or obtained through a transaction that included bribery.[291]

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[283] SETIONO & HUSEIN, *supra* note 282, at 9–22.

[284] WOOD SUPPLY IN MONGOLIA, *supra* note 282, at 44.

[285] *Id.* According to the report, "People involved in the illegal timber trade carry out their business by working in collusion with or by bribing relevant officers at all stages—from the purchasing of logging permits to the sale of wood in Ulaanbaatar." *Id.* at 43.

[286] ALBERTO GOETZL & HAKAN C. EKSTRÖM, INT'L TROPICAL TIMBER COUNCIL, REPORT ON THE REVIEW OF THE US MARKET FOR TROPICAL TIMBER PRODUCTS 16–17 (2007).

[287] *Id.*

[288] *See* U.S. Fish & Wildlife Serv., Announcement for US Timber Importers and Re-Exporters (n.d.), http://www.fws.gov/international/pdf/letter-appendix-III-timber-listings-june-2014.pdf [http://perma.cc/XR9N-CYKS] (informing importers and re-exporters that Mongolian oak had been added to CITES Appendix III and thus requires additional documentation upon entry to the United States).

[289] Youatt & Cmar, *supra* note 1, at 19.

[290] *See* 15 U.S.C. § 78dd-1(a)(1) (2012). *See generally* Asner et al., *supra* note 30 (discussing the similarities between the use of bribery in the wildlife and timber contexts, and how the FCPA could be used to prosecute cases in both areas).

[291] *See Castlewood Prods. II*, 365 F.3d 1076, 1078–80 (D.C. Cir. 2004).

Companies such as Castlewood Products, L.L.C., Interforest Corp., M. Bohlke Veneer Corp., Marwood, Inc., United Veneer, L.L.C., Veneer Technologies, Inc., and Aljoma Lumber, Inc.—the plaintiffs in *Castlewood L.L.C. v. Norton*—were aware that the United States Department of Agriculture and the Fish and Wildlife Service had seized their shipments of Brazilian bigleaf mahogany based on the belief that it had been illegally logged.[292] The plaintiff-importers disputed this characterization, arguing that the timber had valid foreign export permits.[293] United States furniture retailers Baker, Hickory, Lexington, and Century Furniture import timber, including mahogany, from Caoba de Honduras, a Honduran timber exporter that has acknowledged the widespread and pervasive corruption in the forest sector from which it sources its wood.[294] These United States importers and distributors either knew or should have known that there was a possibility that the timber they were importing was obtained after a bribe was paid to influence an act or decision of a foreign official, inducing such foreign official to violate a law in the timber's country of origin (i.e. Peru, Brazil, Honduras) in order to secure an improper business advantage to obtain or retain business.[295] If indeed the companies have engaged in such conduct, it would constitute a violation of the Foreign Corrupt Practices Act anti-bribery provisions.[296]

The expansive reach of the FCPA makes it possible to reach illegal logging transactions in a variety of contexts. To illustrate, consider the following example: a United States timber importing corporation ("USTimber") imports timber from Peru. USTimber has received requests from the Peruvian timber exporter company ("PeruTimber") for an unusual amount of discretionary money ($10,000) in its monthly budget request. A USTimber employee goes to PeruTimber to discuss the request. PeruTimber keeps detailed financial records, but is unable to provide detailed information about how the discretionary funding is being spent. Upon questioning, the PeruTimber employee admits to the USTimber employee that the money is being spent on export fees although it is not listed as such on the budget report. The USTimber employee suspects that the money is being spent to get false documentation of illegal Peruvian mahogany, as USTimber has received consistent shipments of Peruvian mahogany, despite increasingly onerous regulations and supply shortages. The USTimber employee reports back to USTimber, which states that it will keep an eye on the situation, but

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[292] *Id.*

[293] *Id.* at 1081.

[294] *See* THE ILLEGAL LOGGING CRISIS, *supra* note 124, at 36.

[295] *See* 15 U.S.C. § 78dd-1(a)(1); *Castlewood Prods. II*, 365 F.3d. at 1078–80; THE ILLEGAL LOGGING CRISIS, *supra* note 124, at 36.

[296] *See* 15 U.S.C. § 78dd-1(a)(1).

continues to do business with PeruTimber and takes no further action at that time. This situation somewhat resembles the conduct at issue in *United States v. Labs of Virginia*, where defendant, a United States laboratory, continued to import a shipment of monkeys knowing that they were violating Indonesian law.[297] Under the FCPA, however, it is not necessary that defendant United States corporations be aware of what specific local law they are violating, or the species of timber being illegally harvested, or any details of the bribe paid for false documents used to export the timber, in order for criminal liability to exist.[298]

Small changes to the first example further demonstrate the FCPA's reach. On the same facts as the first example, USTimber's parent company ("USParent") could be charged with an FCPA violation for the same conduct, even without any knowledge of the conduct.[299] USTimber could still be charged on the same facts, where USTimber does not send an employee to speak with PeruTimber. USTimber is aware of the shortage of Peruvian mahogany, and the prevalence of bribes in the Peru forest sector, and prefers not to question how it is able to continue to import large quantities of Peruvian mahogany. Even without any direct awareness of bribes being paid to customs officials, USTimber—and USParent—could be charged with an FCPA violation.[300]

Finally, consider the same facts involved in the first example, but with a Chinese company ("ChinaTimber") importing shipments of Peruvian mahogany from PeruTimber. Most of the business transactions between ChinaTimber and PeruTimber take place over the phone. One day, an employee from ChinaTimber is travelling in the United States for other legitimate business. While in the United States, ChinaTimber employee receives a phone call from a counterpart at PeruTimber to request additional funding for export fees. The ChinaTimber employee, suspecting, but not knowing,

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[297] *See* 272 F. Supp. 2d 764, 767 (N.D. Ill. 2003).

[298] *See* 15 U.S.C. § 78dd-1(a)(1); United States v. Kay, 359 F.3d 738, 740 (5th Cir. 2004) (interpreting the "business-nexus" requirement expansively to include bribes paid to avoid customs duties); S.E.C. v. Jackson, 908 F. Supp. 2d 834, 849 (S.D. Tex. 2012) ((holding that "the language of the statute does not appear to require that the identity of the foreign official involved be pled with specificity"); *id.* at 851 (quoting H.R. REP. 100-576 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547 (holding that Congress had intended to prohibit actions taken with actual knowledge, as well as actions taken when there was evidence of "a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act")); United States v. Aguilar, 783 F. Supp. 2d 1108, 1112 (C.D. Cal. 2011). (interpreting "foreign official" expansively).

[299] *See* RESOURCE GUIDE, *supra* note 148, at 27–28; Williams, *supra* note 221.

[300] *See Jackson*, 908 F. Supp. 2d at 851 (quoting H.R. REP. NO. 100-576, at 919–21 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547) (holding that Congress had intended to prohibit actions taken with actual knowledge, as well as actions taken when there was evidence of "a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act"); Sarfaty, *supra* note 97, at 427.

that the additional funding will be used to bribe customs officials, agrees to provide the additional funding. This conduct, despite being between two foreign corporate entities, could also result in prosecution under the FCPA. ChinaTimber could be charged with a violation of 15 U.S.C. § 78dd-3, which prohibits anyone from making "use of the mails or any means or instrumentality of interstate commerce."[301]

CONCLUSION

No existing methods have worked to stop the cycle of illegal logging. The 2008 Lacey Act Amendments, which expanded the Lacey Act to include timber, have not yet proven successful. The Lacey Act's negligence mens rea requirement, which requires importers to exercise "due care," was developed through years of litigation in the illegal wildlife trafficking context, and may not be easily transferable to the timber industry. Illegal logging poses challenges not paralleled in the wildlife trafficking context, including difficulty in definitively identifying timber by sight at inspection points. The Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") treaty, which has proven to be somewhat successful in the wildlife trafficking context, is confined to species listed on the CITES appendices. Thus, charges of CITES violations would necessarily require a definitive identification of the species of illegal timber being imported.

As a leading importer of timber and wood products, the United States plays a central role in the transnational illegal logging industry. Illegal logging causes significant and irreparable harms including deforestation, global warming, harm to indigenous communities, harm to the economies of countries where it takes place, and the permanent eradication of some species of timber. The Unites States has both the means and the tools necessary to interrupt the cycle of illegal logging. The Foreign Corrupt Practices Act ("FCPA") can and should be used to combat illegal logging. By targeting the bribery that facilitates illegal logging around the world, use of the FCPA would circumvent the difficulties in pursuing Lacey Act or CITES prosecutions.

The FCPA's anti-bribery provisions are broadly drafted and encompass a wide range of conduct. FCPA prosecutions would not necessitate detailed factual findings regarding the illegally harvested timber. Given the increase in FCPA prosecutions, and the emergence of new theories of FCPA liability, now is the time to expand the use of the FCPA to the realm of illegal logging.

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[301] *See* 15 U.S.C. § 78dd-3; Telesetsky, *supra* note 149, at 988 (arguing that the FCPA could be used to prosecute foreign actors on U.S. soil for engaging in illegal transnational fishing); Sivachenko, *supra* note 149, at 400.